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The Jurisdiction of the Inter-American Court of Human Rights Should Outlive Defection

Humberto Briceno Leon*

The Inter-American Court of Human Rights' jurisdiction should outlive the purpose of any state to denounce the American Convention on Human Rights in order to avoid disadvantageous international rules and circumvent the international adjudicative authority to protect victims of human rights violations. I begin by outlining the Human Rights jus cogens nature integrated into the universal international human rights law. Following that, I review leading international court cases approaching the jurisdictional paradigm on treaty defections. Furthermore, I propose two conjunctive new elements modifying the mechanical jurisdictional paradigm: the constitutional internationalized human rights treaties and the substantial reviewability of a treaty's defection. I conclude by examining the interface concerning the American Convention on Human Rights and Latin American constitutions. In approaching the Latin American constitutions, I will demonstrate how what I refer to as the "jus cogens complementary jurisdictional model" would operate.

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I. INTRODUCTION

“You can check out any time you like
But you can never leave”¹
“Hotel California” – Eagles

In 1803, United States Chief Justice John Marshall observed that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”² According to the indisputable universal standard of *ubi jus ibi remedium*, for every wrong, the law must provide a remedy for the wrong.³ This is most notable in international human rights law.

The Inter-American Court of Human Rights’ jurisdiction should outlive the purpose of any state who denounces the American

¹ EAGLES, *Hotel California*, on HOTEL CALIFORNIA (Criteria Studios 1977).

² *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

³ See Hum. Rts. Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

Convention on Human Rights (AMCHR) in order to avoid disadvantageous international rules and circumvent the international adjudicative authority to protect victims of human rights violations. I begin by outlining the human rights *jus cogens* integrated into universal international human rights law. Following that, I review the leading international court cases approaching the jurisdictional paradigm on treaty defections. Furthermore, I propose two conjunctive new elements that modify the mechanical jurisdictional paradigm: (1) constitutional internationalized human rights treaties and (2) substantial reviewability of a treaty's defection. I conclude by examining the interface concerning the AMCHR and Latin American constitutions. In examining the Latin American constitutions, I will demonstrate how what I refer to as the "*jus cogens* complementary jurisdictional model" would operate.

Given the principle of subsidiarity in the international human rights forum, human rights should be safeguarded by special international bodies when the national or domestic systems are unwilling or unable to do so efficiently.⁴ No human rights protection, domestic nor international from the Inter-American court, would be available when the following conditions persist: domestic absence of a trustworthy judiciary, denunciation of the AMCHR, mechanical interpretation of the international treaties' disengagement rules, and the lapsation of the post-withdrawal temporal jurisdiction remaining.

Any state—whether a perpetrator of human rights violations in Latin America or elsewhere—would yield an immunity prerogative of sorts.⁵ The victims of those transgressions would be defenseless and unable to secure redress.⁶ Under these circumstances, a rigid conventional or contractual international human rights law perspective would surrender regional human rights values that were poorly constructed after the Second World War.

⁴ See Humberto Briceño León, *The International Criminal Court: Interconnection Between International Bodies in Venezuela*, 24 LEWIS & CLARK L. REV. 261, 296 (2020).

⁵ See generally Rosanne van Alebeek, *Immunity and Human Rights? A Bifurcated Approach*, 104 PROC. OF THE ANN. MEETING (AMERICAN SOC'Y OF INT'L L.) 67, 67 (2010).

⁶ See Zia Akthar, *Acts of State, State Immunity, and Judicial Review in the United States*, 7 BRIT. J. OF AM. LEGAL STUD. 206, 206 (2018).

II. HUMAN RIGHTS: THE *JUS COGENS* CHARACTER

Over the past half-century, the universalization of human rights has become a clear phenomenon.⁷ Contemporarily, prominent scholars have highlighted this phenomenon's effect over international law, especially regarding the very classic Westphalian model of sovereignty. Indeed, Professor Dworkin has observed that "[a] government is illegitimate if it violates the basic human rights of its citizens . . . [and] fails in its duties when it uses the shield of sovereignty to decline to protect people in other nations from war crimes, genocide, and other violations of human rights."⁸

The sovereignty-based arguments against the applicability of internationally protected human rights are no longer effective. This is the result of an enormous compendium of treaties, customary state practices, and legally binding international law that have characterized the aggregation of treaties, customs, national legislation, and *jus cogens*.⁹

In international law, *jus dispositivum* and *jus cogens* are notions related to the power of states to conclude international treaties.¹⁰ Some treaties could be left without constraints and thus having the character of the *jus dispositivum*. Conversely, others have the nature of *jus cogens* from which no abrogation is permitted.¹¹ In Article 53, the Vienna Convention on the Law of Treaties ("Vienna Convention") codified the conflict with a peremptory norm of general international law (i.e., *jus cogens*).¹²

⁷ See André Luiz Siciliano, *The Role of the Universalization of Human Rights and Migration in the Formation of a New Global Governance*, 9 SUR INT'L J. ON HUM. RTS. 109, 109–10 (2012).

⁸ GENERAL THEORY OF INTERNATIONAL LAW 45 (Siegfried Wiessner ed., 2017) (citing Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2, 17–18 (2013)).

⁹ M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 238 (1993).

¹⁰ Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, KLUWER L. INT'L, 595, 595 (2003).

¹¹ Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 55 (1966).

¹² Vienna Convention on the Law of Treaties art. 53, May 23, 1969–Apr. 30, 1970, 1155 U.N.T.S. 344 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention] ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present

The international regulations governing *jus cogens* are all rules created for humanitarian purposes— not in the interest of individual states, but in the interest of humanity.¹³ Members of the United Nations have the obligation to respect fundamental freedoms.¹⁴ Since 1946, the General Assembly of the United Nations has been dictating resolutions defending and promoting human rights.¹⁵ In 2001, the “Draft articles on Responsibility of States for Internationally Wrongful Acts” were submitted to the General Assembly. Article 26 declared “[n]othing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.”¹⁶ More recently, in March 15, 2006, the General Assembly stated that it is the responsibility of all states to respect human rights and fundamental freedoms “without distinction of any kind as to race, color, sex, language, religion, political opinion, national or social origin, property, birth or other status.”¹⁷ The International Court of Justice (ICJ) also decided that states are required to uphold their obligations under the United Nations Charter along with other rules of international law, including international humanitarian and human rights laws.¹⁸

In 1987, the Inter-American Commission on Human Rights adopted the concept of *jus cogens* “from ancient law concepts of a ‘superior order’ of legal norms, which the laws of man or nations may not contravene. The *jus cogens* norms have been described as ‘comprising “international public policy.”’”¹⁹ The Inter-American

Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

¹³ Verdross, *supra* note 11, at 59.

¹⁴ See *The Foundation of International Human Rights Law*, U.N., <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited Sept. 24, 2020).

¹⁵ See G.A. Res. 1 (I) (Jan. 24, 1946).

¹⁶ *Responsibility of States for Internationally Wrongful Acts*, 2001 Y.B. Int’l L. Comm’n 84, U.N. Doc. A/56/10.

¹⁷ G.A. Res. 60/251 A, at 1 (Mar. 15, 2006).

¹⁸ *Armed Activities on Territory of Congo* (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 53, ¶ 127 (Feb. 3).

¹⁹ *Roach v. United States*, Case 9647, Inter-Am. Comm’n H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1 ¶ 55 (1987).

Court's first reference to *jus cogens* was in 1993, when it referred to the prohibition of slavery as a norm of *jus cogens*.²⁰ Indeed, it asserted "[t]he Court does not deem it necessary to investigate whether or not that agreement is an international treaty. Suffice it to say that even if that were the case, the treaty would today be null and void because it contradicts the norms of *jus cogens supervenience*."²¹ Later, in 2003, the Inter-American Court decided that, "[t]he absolute prohibition of torture, in all its forms, is now part of international *jus cogens*."²² Subsequently, in 2005, the court again confirmed that

[t]he above mentioned international instruments and its own case law lead the Court to conclude that there is a universal prohibition of torture and other cruel, inhuman or degrading treatment or punishment, independent of any codification or declaration, since all these practices constitute a violation of peremptory norms of international law.²³

The Inter-American Court has found different norms that constitute as *jus cogens*, such as rules against slavery, torture, any cruel inhuman and degrading treatment or punishment, discrimination, grave or systematic violations of human rights, and humanitarian law.²⁴ The court also found the prohibition against genocide, crimes against humanity, forced disappearance, the right to life, and the right to be seen as equal before the law as *jus cogens*.²⁵

According to Professor Andrea Bianchi of Johns Hopkins University, the Graduate Institute of International and Development Studies, Geneva, and the Catholic University, Milan, today, the notion of *jus cogens* is at the heart of the international human rights

²⁰ *Aloeboetoe v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 57 (Sept. 10, 1993).*

²¹ *Id.*

²² *Maritza Urrutia v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 92 (Nov. 27, 2003).*

²³ *Caesar v. Trinidad & Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 70 (Mar. 11, 2005).*

²⁴ DIANA CONTRERAS-GARDUÑO & IGNACIO ALVAREZ RIO, *THE REALIZATION OF HUMAN RIGHTS: WHEN THEORY MEETS PRACTICE: STUDIES IN HONOUR OF LEO ZWAAK* 113-124 (Yves Haeck et al. eds., 2013).

²⁵ *Id.* at 122.

legal system.²⁶ Far from the traditional conception, *jus cogens* grants priority to certain rules over others, whereby human rights, treaties, and customary law should prevail over other sources of international and domestic law.²⁷ As Professor Anthony Colangelo of the Southern Methodist University Dedman School of Law has observed, “[s]tate[] Parties have created through their entrance into the treaty a customary international legal prohibition that extends into the territories of all States, irrespective of their status under the positive law of the treaty.”²⁸

III. THE INTERNATIONAL COURTS AND JURISDICTIONAL PARADIGM: THE LEGITIMATE DEFECTION, A NEW COMPONENT

The following are relevant international cases in which *jus cogens* norms could serve as grounds for the ICJ’s jurisdiction. The leading case before the ICJ was *Democratic Republic of the Congo v. Rwanda* in 2006.²⁹ On May 28, 2002, the Government of the Democratic Republic of the Congo (“DRC”) filed a proceeding before the ICJ against the Republic of Rwanda (“Rwanda”) concerning flagrant violations and breaches of human rights and international humanitarian law.³⁰ By killing, massacring, raping, throat-cutting, and crucifying more than 3.5 million Congolese, the DRC asked the ICJ, among other requests, to declare that Rwanda had violated the right to life provided for in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, and other relevant international legal instruments.³¹

The ICJ’s original jurisdiction concerning peremptory norms has been set forth in articles 66 (a), 64, and 53 of the Vienna

²⁶ Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L L. 491, 494 (2008).

²⁷ *Id.* at 494-95.

²⁸ Anthony J. Colangelo, *Universal Jurisdiction as an International “False Conflict” of Laws*, 30 MICH. J. INT’L L. 881, 913 (2009).

²⁹ *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Rwanda)*, Judgment, 2006 I.C.J. 6 (Feb. 3).

³⁰ *Id.* at 11-12, ¶1.

³¹ *Id.* at 15, ¶11(d).

Convention.³² Textually, this jurisdiction stands for inter-party controversies to the extent that it involves a new peremptory norm in conflict with any existing treaty or concerns a treaty which at the time of its conclusion is in contradiction with peremptory norms.³³ The DRC did not allege any of these circumstances directly to reach the ICJ jurisdiction in the Congo case.³⁴

In this case, the DRC alleged numerous international conventions that grant the ICJ jurisdiction to apply and interpret the international treaty at issue.³⁵ The DRC purported that several international conventions provided the ICJ with additional jurisdictions bases in the event that the Vienna Convention did not grant the original jurisdiction; however, those grounds did not convince the court.³⁶ The ICJ decided the governmental withdrawal reservation is invalid not because of the withdrawal purpose, but because (1) the breach of procedural rules and Rwanda's reservation to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide was not incompatible with the object and purpose of the Convention; (2) Rwanda's reservation to Article 22 of the Convention on Racial Discrimination concerning non-compliance with a peremptory norm cannot constitute a basis to find the court's jurisdiction; (3) the court cannot assume jurisdiction on the basis of Article 29 of the Convention on Discrimination against Women on the ground that the preconditions required by that provision for a referral to the Court have not been fulfilled; and (4) Rwanda was not a party to the Convention Against Torture and other Cruel, Inhuman or Degrading

³² Vienna Convention, *supra* note 12, art. 66 ("Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration"); *id.* at art. 64 ("If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates"); *id.* at art. 53 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

³³ *See id.*

³⁴ *See* Dem. Rep. Congo v. Rwanda, 2006 I.C.J. at. 6-10.

³⁵ *Id.*

³⁶ *Id.*

Treatment or Punishment (Article 30.1) and thus the DRC cannot invoke that instrument as a basis of jurisdiction.³⁷ The ICJ also denied arguments based on nonexclusive human rights conventions that the DRC alleged for the ICJ's jurisdiction, for example, on the Constitution of the United Nations Educational, Scientific and Cultural Organization (Article XIV), which did not apply because the DRC failed to fulfill the prior procedure for ceasing the court's jurisdiction.³⁸ The court could also not establish jurisdiction because of the noncompliance preconditions established by the Constitution of the World Health Organization (Article 75).³⁹ On the Convention on the Privileges and Immunities of the Specialized Agencies (Article IX), the DRC also failed to fulfill the conditions required concerning the recourse to arbitration.⁴⁰ Finally, DRC's argument about the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Article 14.1) did not appear to establish jurisdiction.⁴¹

Regarding its jurisdiction in this case, the ICJ asserted that

the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.⁴²

In this case, the ICJ, under its own authority, held that the states should fulfill their *jus cogens* human rights obligations but also decided to exclude human rights peremptory norms "in itself" as a basis for its jurisdiction.⁴³ This international judicial decision raised an ostensible conflict: the state's obligations and responsibilities were judicially affirmed, but without jurisdiction to address it.⁴⁴ This ICJ ruling has been criticized, as Professor Andrea Bianchi has

³⁷ *Id.* at 21-53.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Dem. Rep. Congo v. Rwanda, 2006 I.C.J. at 21-53.

⁴¹ *Id.*

⁴² *Id.* at 52.

⁴³ *Id.* at 52 ¶ 125.

⁴⁴ *Id.* at 52-53.

observed, “[t]he inderogability paradigm and its mechanical application may bring about anti-systemic effects and eventually jeopardize even the role that *jus cogens* may play in its symbolic dimension.”⁴⁵

The academic forum has found the ICJ’s doctrine contradictory, as it, on the one hand, employs the traditional jurisdictional paradigm grounded exclusively in the parties’ agreement regardless of *jus cogens* and, on the other, diverts violations of peremptory norms.⁴⁶ In its purest form, the peremptory model is expressed in non-derogable legal forms, postulating *jus cogens* pre-eminence and values.⁴⁷ Scholars have called for a more flexible interpretation, proposing a higher degree of effectiveness and coherence.⁴⁸

The ICJ held that *jus cogens* could not be the basis for the court’s jurisdiction.⁴⁹ Obviously, the court was very aware of what it was doing.⁵⁰ In doing so, the court used the same idea of *jus cogens* various times, claiming that it “does not in itself suffice to confer jurisdiction on the Court,”⁵¹ “cannot of itself provide a basis for the jurisdiction of the Court,” “the mere fact that rights and obligations erga omnes,” and that it “cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.”⁵² The textual persistence of all those ideas, “in itself” “the mere fact”, from the ICJ approach to its lack of jurisdiction based on the sole notion of *jus cogens*, strongly suggests a court’s potential receptiveness for *jus cogens*’ additional components in order to find jurisdiction.⁵³

An English dictionary defines the words “in itself” as, “[v]iewed in its essential qualities; considered separately from other things.”⁵⁴ From there, those phrases suggest a question: what did the court

⁴⁵ Bianchi, *supra* note 26, at 503-04.

⁴⁶ See Contreras-Garduño & Alvarez Rio, *supra* note 24, at 119.

⁴⁷ See Bianchi, *supra* note 26, at 505.

⁴⁸ *Id.*

⁴⁹ Dem. Rep. Congo v. Rwanda, 2006 I.C.J. at 52, ¶ 125.

⁵⁰ *See id.*

⁵¹ *Id.*

⁵² *Id.* at 28, ¶ 60

⁵³ *See id.*

⁵⁴ *UK Dictionary*, LEXICO, <https://www.lexico.com/definition/itself> (last visited May 11, 2020) (defining “itself” as “viewed in its essential qualities; considered separately from other things.”).

attempt to signify by persistently using the phrase “in itself”? I propose an alternative reading to the court’s traditional doctrine on the jurisdiction—*jus cogens* connection or disconnection. The ICJ left open a window when it said that the *jus cogens* character “in itself” did not suffice to confer its jurisdiction.⁵⁵ Consequently, *jus cogens* together with the right component could provide the basis for the court’s jurisdiction. I refer to this alternative understanding the “*jus cogens* complementary jurisdictional model.”

In this article, I explore the far off-centered notions surrounding the use of the rigid jurisdictional paradigm when it is stated that *jus cogens* “in itself” does not serve to establish jurisdiction.⁵⁶ The new model takes this notion and integrates it into the traditional jurisdictional paradigm. As a result, my model incorporates two closely related, conjunctive elements: first, the acknowledgement of *jus cogens* as constitutionally internationalized in the human rights contained in the AMCHR; and second, a substantive reviewability of a treaty’s defection. I consider both elements conjunctively because a disjunctive approach would not operate under the plain mechanical jurisdictional paradigm. The first element was dismissed disjunctively in the case because *jus cogens* in itself is insufficient to confer jurisdiction on the court.⁵⁷ The ICJ has disjunctively applied the second element, but only on the grounds of its incompatibility with procedural formalities as required by international treaty law.⁵⁸ The traditional jurisdiction paradigm has not directly considered the reviewability of the abrogation of substantive purposes as grounds to invalidate a treaty defection.⁵⁹

According to the monist view, international and domestic laws are part of the same legal order, but international law prevails over domestic law.⁶⁰ Following Professor Bradley, from the dualist perspective, international and domestic laws are distinct, and domestic law defines the rank of international law within in the domestic

⁵⁵ See Dem. Rep. Congo v. Rwanda, 2006 I.C.J. at 52.

⁵⁶ See *id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 25.

⁵⁹ See *id.* at 29.

⁶⁰ Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530 (1999).

system.⁶¹ Concerning the proposed model, the monist and dualist doctrines would reach the same practical consequence. Indeed, both perspectives would grant the Inter-American Court authority over any given party of the AMCHR: under the dualistic view, because the international jurisdiction would come from the domestic law adoption of the AMCHR prevalence, and under the monist view because of the plain international law pre-eminence.⁶²

Once all other conditions required by international law are fulfilled, which other possible factors could establish jurisdiction on the court? Applying the mechanical jurisdictional paradigm to human rights treaties exclusively would make a denunciation almost always be a valid form to defect it regardless of its purposes.⁶³

Under the traditional jurisdictional model, a denunciation purpose could be to join a more advanced court in conflict with the one in charge or to join a more progressive international human rights treaty. This treaty defection could be endorsed as a result of compliance of the procedural requirements of the national law and the correlative standards of international law. In this case, the treaty's withdrawal would be valid because of the procedural rules, not because of its good purposes. Now, the same inflexible traditional jurisdictional paradigm has an inverse component: a counter-*jus cogens* defection to a human rights treaty pursuing to avoid sanctions and circumvent peremptory obligations. In the latest case, the denunciation would also be valid, regardless of the intrinsic regrettable purpose involved.

In the example, the governmental act issuing the counter-*jus cogens* defection would be heard before an international court. Indeed, the ICJ reviewed the Congo case under the procedural international law standards stemming from Rwanda's withdrawal of its prior reservation to Article IX of the Genocide Convention.⁶⁴ The court found the governmental withdrawal reservation invalid because of the breach of procedural rules,⁶⁵ not because of the alleged purpose.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Dem. Rep. Congo v. Rwanda, 2006 I.C.J. at 13.

⁶⁵ *Id.* at 29.

As a result, the court retained the effects of Rwanda's original reservation to the ICJ jurisdiction, therefore its lack of jurisdiction.⁶⁶

As the "*jus cogens* complementary jurisdictional model" submits, the international court would keep competence to review the governmental defections acts as the traditional jurisdiction paradigm does. To review the defections of an international human rights treaty, the new model adds the counter-*jus cogens* component as a new cause of invalidation.⁶⁷ In this model, the "mere"⁶⁸ existence of peremptory norms is not sufficient to establish jurisdiction when there is a legitimate reason to leave a human rights treaty. Admitted as illegitimate, the counter-*jus cogens* component as grounds to invalidate the defection, the protection for the peremptory human rights survives.⁶⁹

Displaying its potential openness to the new "*jus cogens* complementary jurisdictional model" in the same Congo case, the ICJ took modest steps toward the counter-*jus cogens* factor. Indeed, the decision affirmed that the DRC made no objection to the Rwanda reservation of the Genocide Convention.⁷⁰ The court, however, suggested a possible illegal reservation under the grounds of its incompatibility with the object and purpose of the Convention.⁷¹ In fact, according to the conventional rules, the court stated "in the view of the Court, a reservation under the Genocide Convention would be permissible to the extent that such reservation is not incompatible with the object and purpose of the Convention."⁷²

IV. THE CONSTITUTIONALLY INTERNATIONALIZED JUS COGENS AS A FUNDAMENTAL FACTOR

On February 1988, a meeting convened by the Commonwealth Secretariat and chaired by Prafullachandra Natwarlal Bhagwati, Chief Justice of India took place.⁷³ In that meeting, the participating

⁶⁶ *Id.*

⁶⁷ *See id.* at 50.

⁶⁸ *Id.* at 52 (the word "mere" was used by the I.C.J in the Congo case).

⁶⁹ *Id.* at 8.

⁷⁰ Dem. Rep. Congo v. Rwanda, 2006 I.C.J at 33.

⁷¹ *Id.* at 7.

⁷² *Id.* at 32.

⁷³ Michael Kirby, *International Law-The Impact on National Constitutions*, 21 AM. U. INT'L. L. REV. 327, 334-335 (2006).

judges accepted the so-called Bangalore Principles on the Domestic Application of International Human Rights Norms.⁷⁴ Since then, the Bangalore Principles have played a significant role in the adoption or incorporation of the international human rights law into domestic law, including national constitutions.⁷⁵ International law has enhanced constitutionalism and international human rights laws, creating a globalized phenomenon.⁷⁶ As a result, international instruments and national practices might influence each other and could thus be seen as a model of constitutional convergence.⁷⁷ Both elements show a general principle in international law as well as an interactive relationship between constitutionalism and internationalism.⁷⁸

A. The Inter-American Court, the Interface: Constitutions-International Human Rights Treaties

Since international law provides rules of rights enforcement for the national constitution, the reverse tends to happen as well; some domestic constitutions incorporate more precise rules.⁷⁹ The interrelation between international treaties and constitutions is a two-way path. The first path is represented by the international treaties' significance over the national laws included in the constitutions.⁸⁰ The international human rights incorporation into constitutions is a process that has been exhaustively studied by the legal academy.⁸¹ The second path is the reverse: the constitutions' legal significance into the international human rights system. Indeed, the internationalized constitution is influenced to confer jurisdiction on the international court, as I suggest.⁸²

⁷⁴ *Id.*

⁷⁵ *Id.* at 340.

⁷⁶ Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. OF INT'L L. 749, 766 (2008).

⁷⁷ Tom Ginsburg, Zachary Elkins & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61, 65 (2013).

⁷⁸ See Bassiouni, *supra* note 9, at 239.

⁷⁹ See Ginsburg et al., *supra* note 77, at 83.

⁸⁰ *Id.* at 84.

⁸¹ See *id.* at 88.

⁸² *Id.* at 65.

Today, the human rights system itself can appropriately be categorized as a constitutionalized regime of international law and has “become one of constitutional law in its own right.”⁸³ Then, there is a universal crystallization of human rights laws into the constitutions, known as internationalized constitutions.⁸⁴ Some rights, for example the freedom of expression and freedom of religion, appear in almost nine of every ten contemporary constitutions.⁸⁵

Some contemporary constitutions tend to rank international human rights treaties over the ordinary norms and, in some cases, “equivalent to or even above constitutional norms”⁸⁶ As a result, in Latin America, internationalized constitutions have taken a progressive role since the second half of the last century.⁸⁷ The supra-constitutional or constitutional hierarchy given to the human rights treaties began in the region in 1979, with the Peruvian Constitution, followed by the constitutions of Argentina, Chile, Colombia, Bolivia, Ecuador, Paraguay, Peru, Guatemala, Honduras, El Salvador, Dominican Republic, Mexico, and Venezuela.⁸⁸ Also, the Constitutional Chamber of the Supreme Court of Costa Rica stated that the AMCHR is ranked above the Constitution,⁸⁹ as it also is in Switzerland, “where the peremptory norms of *jus cogens*, but not

⁸³ Gardbaum, *supra* note 76, at 752.

⁸⁴ See generally Gonzalo Aguiar Caballo, *La internacionalización del Derecho Constitucional*, 5.1 ESTUDIOS CONSTITUCIONALES: REVISTA DEL CENTRO DE ESTUDIOS CONSTITUCIONALES 223 (2007) (Spain).

⁸⁵ Ginsburg et al., *supra* note 77, at 72.

⁸⁶ Neil Walker, *Sovereignty and Beyond: The Double Edge of External Constitutionalism*, 57 VA. J. INT’L L. 799, 815 (2018).

⁸⁷ See generally Gabriel Negretto & Javier Couso, *Constitution-Building Processes in Latin America*, INT’L IDEA DISCUSSION PAPER (2018) 6, 10-11, <https://www.idea.int/sites/default/files/publications/constitution-building-processes-in-latin-america.pdf>.

⁸⁸ Eduardo Ferrer Mac-Gregor, *Interpretación Conforme y Control Difuso de Convencionalidad. El Nuevo Paradigma para el Juez Mexicano*, Año 9, N° 2, CENTRO DE ESTUDIOS CONSTITUCIONALES DE CHILE UNIVERSIDAD DE TALCA, 531, 547 (2011); see also Carlos M. Ayala Corao, *La Jerarquía Constitucional de los Tratados Relativos a los Derechos Humanos y sus Consecuencias*, INSTITUTO DE INVESTIGACIONES JURIDICAS, 37,44 (2002), <https://archivos.juridicas.unam.mx/www/bjv/libros/1/342/4.pdf>.

⁸⁹ Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [Supreme Court of Justice of Costa Rica], Exp. 0421-S-90, No. 2313-95, *in* UNHCR ACNUR (May 9, 1995), <https://www.acnur.org/fileadmin/Documentos/BDL/2012/2844.pdf>.

the other rules of customary international law, are superior to the Constitution.”⁹⁰

In Latin America, the AMCHR and the constitutional concordat guarantees opened up the domestic legal order to international human rights law. The Inter-American jurisprudence shows that states have repealed and amended laws, including their own constitutions as “[t]here is little doubt that this system constitutes the normative core of the *Ius Commune*.”⁹¹

The current interrelation between international treaties law and constitutions has prompted international courts to consider the significance and legal weight that constitutions could have over the international human rights system.⁹²

In the concurring opinion in *Caesar v. Trinidad and Tobago*, according to Inter-American Court judge, A.A. Cançado, European and Inter-American courts have agreed on limits to state voluntarism to safeguard the integrity of the human rights treaties and the primacy of public order over the will of individual States.⁹³ In *Caesar*, the court expressly dismissed the national constitution as a shield against the AMCHR.⁹⁴ Indeed, the court stated that

[I]nasmuch as it immunizes the Corporal Punishment Act from a challenge, the ‘savings clause’ under Section 6 of Trinidad and Tobago’s Constitution is incompatible with the Convention. Therefore, the court orders the State to amend, within a reasonable time, Section 6 of Trinidad and Tobago’s Constitution⁹⁵

⁹⁰ Ginsburg, et. al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 205 (2008).

⁹¹ Armin von Bogdandy, *Ius Constitutionale Commune en América Latina: Observations on Transformative Constitutionalism*, 109 AM. J. INT’L L. UNBOUND 109 (2015).

⁹² See, e.g., Stephen P. Mulligan, *International Law and Agreements: Their Effect upon U.S. Law*, CONGRESSIONAL RESEARCH SERVICE 1, 18 (2018).

⁹³ See *Caesar v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 27 (Cancado Trindade, J., concurring) (Mar. 11, 2005).

⁹⁴ *Id.* at ¶ 133 (Garcia-Ramirez, J., concurring)

⁹⁵ *Id.*

Thus, the three internal state acts that were upheld by the Inter-American Court to be incompatible with the AMCHR include the punishment inflicted over the claimant, the Corporal Punishment Act, and Trinidad and Tobago's Constitution clause.⁹⁶

In *Olmedo-Bustos v. Chile*, the Inter-American court went further and found four state acts that were incompatible with the AMCHR.⁹⁷ These acts included an adjudicative act that censored the film "The Last Temptation of Christ," an executive decree law that authorized the Cinematographic Classification Council for censorship purposes, the Chilean Supreme Court decision that confirmed the censorship, and Article 19(2) of the Chilean Constitution that allowed the censorship.⁹⁸ The four state acts coincidentally allowed the censorship, the adjudicative act, the decree-law, the Supreme Court decision, and the Constitutional clause.⁹⁹ The Inter-American court then established authority to review the constitutional clauses, other normative acts, supreme court decisions, and governmental adjudications.¹⁰⁰

As a matter of consistency, if the Inter-American court has the authority to dismiss a constitutional clause incompatible with the AMCHR, the court has the same authority to enforce a constitutional rule fully compatible with the AMCHR.¹⁰¹ If a constitutional rule fully consistent with the AMCHR constrains the governmental authority to denounce the AMCHR as illegitimate, a substantive breach of internationalized constitutional limitation should be equally invalidated.¹⁰²

As a highly persuasive authority in International Law, the ICJ in Guinea has affirmed this power, claiming that "where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt the proper interpretation."¹⁰³

⁹⁶ *Id.* at ¶¶ 130, 132, 133.

⁹⁷ *See generally* *Olmedo-Bustos v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, (Feb. 5. 2001).

⁹⁸ *Id.* at ¶¶ 60(a-b, e-f), 104(4).

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ *See, e.g.*, Case Concerning Ahmdau Sadio Diallo (Rep. of Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 665, ¶ 70 (Nov. 30).

¹⁰² *See, e.g., id.*

¹⁰³ *Id.*

B. Constitutional Weight on the International Treaty. Latin American Constitution: An Illegitimate Defection.

The *jus cogens* complementary jurisdictional model is not applicable to every international treaty. For the model to operate, it requires the involvement of *jus cogens*, similar to the Vienna Convention.¹⁰⁴ It entails that the living constitutional-international human rights interface acknowledge the peremptory character of the treaty.¹⁰⁵

As discussed above, the ICJ's holding in the Congo case allows an unostentatious window to its rigid jurisdictional paradigm.¹⁰⁶ Additionally, the same ICJ court in *Guinea v. Congo* stated that a manifestly incorrect interpretation of domestic law is for an international court to adopt the proper interpretation.¹⁰⁷ In *Guinea*, the court emphasized a particular circumstance in which the International Court should correct the local understanding. This circumstance arises it is when the manifestly incorrect interpretation has the purpose of gaining an advantage in a pending case.¹⁰⁸ On this question, the *Guinea* case seems to offer a more flexible reading of the traditional jurisdiction paradigm than that asserted in the *Congo* case.¹⁰⁹

The Costa Rican, Bolivian, Ecuadorian, and Venezuelan constitutional systems have ranked the normative authority of the AMCHR above the constitutional rules.¹¹⁰ Then, hypothetically, if a national interpretation from any of these countries wrongly affirms the constitutional consistency of the AMCHR's denunciation, it is up to the Inter-American court's jurisdictional power to correct it.¹¹¹ Otherwise, if the court follows the mechanical application of the jurisdictional-paradigm, it would just be focused on the plain consent of the parties.¹¹² I deeply share Professor Andrea Bianchi's hope: "It is to be hoped that the focus will be shifted from the mechanical

¹⁰⁴ Vienna Convention, *supra* note 12.

¹⁰⁵ *See id.*

¹⁰⁶ *See* Armed Activities on Territory of Congo (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 52-53 (Feb. 3).

¹⁰⁷ *See* Case Concerning Ahmdau Sadio Diallo (Rep. of Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 665, ¶ 70 (Nov. 30).

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *See* Ferrer Mac-Gregor, *supra* note 85, at 547.

¹¹¹ *See* Rep. of Guinea v. Dem. Rep. Congo, 2010 I.C.J. at 665.

¹¹² *See* Dem. Rep. Congo v. Rwanda, 2006 I.C.J. at 30, ¶¶ 60, 32, 64, 52, 125.

paradigm of inderogability to the more flexible level of interpretation to ensure that *jus cogens* can be implemented at the contextual level with a higher degree of effectiveness and coherence.”¹¹³

In 1999, Peru attempted to withdraw its jurisdiction from the Inter-American court. The court held that the only acceptable method to accomplish such a withdrawal was to completely denounce the AMCHR.¹¹⁴ The court partially acknowledged the ICJ’s traditional jurisdictional paradigm on the denunciation issue, but also gave a step forward to review the denunciation legitimacy by asserting its invalidity.¹¹⁵

In my alternative reading of the ICJ’s jurisdictional-paradigm in the *Congo* case, the AMCHR’s denunciation would be legitimate if the Inter-American Court could not find a purpose to avoid the convention’s substantive obligation, or avoid the disadvantageous international rules circumventing the international adjudicative authority to protect victims of human rights violations that are not for purposes of gaining advantages in a pending case.¹¹⁶ Otherwise, the denunciation would be ineffective and the Inter-American Court would maintain its jurisdiction.¹¹⁷ To invalidate a biased denunciation grounded in the alternative model, the court would have to assert its authority to enforce the effectiveness of the AMCHR. On a similar tendency, a commentator has noted that “[t]he arguments against the legality of late reservations and strategic denunciation are especially strong in the context of the ECHR [European Convention on Human Rights] and ACHR [American Convention on Human Rights].”¹¹⁸

On reviewing a denunciation of AMCHR, the Inter-American Court provides at least three alternative models. One model requires courts to follow mechanically and rigidly the traditional

¹¹³ Bianchi, *supra* note 26, at 505.

¹¹⁴ Case of Ivcher-Bronstein v. Peru, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 40 (Sept. 24, 1999).

¹¹⁵ *Id.*

¹¹⁶ Ed Bates, *Avoiding Legal Obligations Created by Human Rights Treaties*, 57 INT’L & COMP. L.Q., 751, 785 (2008) (“Many if not all of the points that were raised in connection with the legality of late reservations to substantive human rights treaties have some relevance here to bolster the argument as to why resorting to denunciation in a strategic way is an abuse of process.”)

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 787.

jurisdictional paradigm ignoring the *jus cogens* constitutionally internationalized character of the AMCHR as a source of the Inter-American court Jurisdiction. Under this model, the court would sustain its jurisdiction exclusively on the parties' consent.¹¹⁹ Another approach is to acknowledge the peremptory nature of the AMCHR constitutionally internationalized as a framework to review the denunciation substantive legitimacy. Under this model, the court would check specifically if the defection is to avoid adverse international rules or to circumvent its international adjudicative authority, and if it is for the purpose of gaining an advantage in a pending case.¹²⁰ Finally, in view of the denunciation, exclusively based on the inconsistency with the *jus cogens* character of the AMCHR as at issue in a dispute, the court could directly, without any further element, founding its jurisdiction exclusively on the peremptory character of the AMCHR.

A key element for this article's purpose is the relatively new constitutional phenomenon constraining the potential defection from international human rights treaties, restricting the domestic authority conventionally agreed to in order to leave an international human rights treaty. On reviewing the Venezuelan defection to the AMCHR, the Inter-American Court could consider the second alternative, the "*jus cogens* complementary jurisdictional model." Indeed, Venezuela removed itself from the AMCHR, and therefore from the Inter-American Court's jurisdiction by denouncing it on September 10, 2012.¹²¹ Venezuela also withdrew from the Organization of American States on April 27, 2017.¹²² Article 23 of Venezuela's Constitution sets forth the supra-constitutional rank of the international human rights treaties,¹²³ thus superseding national

¹¹⁹ *Id.* at 770.

¹²⁰ *See id.* at 782.

¹²¹ Letter from Ministerio del Poder Popular para Relaciones Exteriores de la Republica de Venezuela (Bolivarian Republic of Venezuela Ministry of Popular Power for Foreign Affairs) to Jose Miguel Insulza, Sec'y Gen. of the Org. of Am. States (Sept. 6, 2012) (on file with http://www.oas.org/es/sla/ddi/docs/Nota_Republica_Bolivariana_de_Venezuela_al_SG_OEA.PDF).

¹²² Letter from Nicolás Maduro Moros, President of the Bolivian Republic of Venez., to Luis Almagro, Sec'y Gen. of the Org. of Am. States (Apr. 27, 2017) (on file with http://www.oas.org/es/sla/ddi/docs/a-41_notas_venezuela_04-28-2017.pdf).

¹²³ Ferrer Mac-Gregor, *supra* note 87, at 547.

laws.¹²⁴ That constitution, in Article 339, also expressly mentions the AMCHR.¹²⁵ In addition, the right to claim human rights violations before an international body is set forth in the first paragraph of Article 31 of the Venezuela Constitution.¹²⁶ This self-executing norm established a direct cause of action; in other words, it gives any Venezuelan citizen the right to go before an international body—a court or quasi-judicial agency—to seek relief.¹²⁷ This same constitutional clause in its second paragraph defers only to the legislature to implement the domestic enforcement, not the international cause of action.¹²⁸ Therefore, according to the Venezuela's current international public law, those decisions are enforceable locally but also internationally without any further implementation.¹²⁹ Thus, the Venezuelan Constitution has incorporated the Inter-

¹²⁴ CONSTITUCION DE LA REPUBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 20, 1999, art. 23, 339 (Venez.).

¹²⁵ *Id.* at art. 339 (The Decree declaring a state of exception, which shall provide for regulating the right whose guarantee is restricted, shall be submitted within eight days of promulgation for consideration and approval by the National Assembly, or Delegated Committee and for a ruling by the Constitutional Division of the Supreme Tribunal or Justice on its constitutionality. The Decree must be in compliance with the requirements, principles and guarantees established in the International Pact on Civil and Political rights and the *American Convention on Human Rights*. The President of the Republic shall have the power to request its extension for a similar period, and the Decree shall be revoked by the National Executive or by the National Assembly or the latter's Delegated Committee prior to the indicated date of expiration upon cessation of the conditions which produced them.).

¹²⁶ *Id.* at art. 31 (“Everyone has the right, on the terms established by the human rights treaties, pacts and conventions ratified by the Republic, to address petitions and complaints to the intentional organs created for such purpose, in order to ask for protection of his or her human rights.”).

¹²⁷ *See id.*

¹²⁸ *Id.* (“The State shall adopt, in accordance with the procedures established under this Constitution and by the law, such measures as may be necessary to enforce the decisions emanating from international organs as provided for under this article.”).

¹²⁹ Eduardo Meier García, *La Desconstitucionalización del Derecho Internacional de los Derechos Humanos en Venezuela*, 17 ANUARIO IBEROAMERICANO DE JUSTICIA CONSTITUCIONAL 187, 204 (2013) (“Si bien la Constitución de 1961 precedía al Pacto Internacional de los Derechos Civiles y Políticos de 16 de diciembre de 1966 y a la Convención Americana sobre Derechos Humanos de 1969, la Corte Suprema de Justicia no dudó en incorporarlos a nuestro derecho interno como norma ejecutiva y ejecutable y reforzada por la jurisprudencia.”).

American Court's jurisdictional authority broadly into the Venezuelan international law system.

To invalidate the defection, in addition to the supra-constitutionalized rank of the human rights treaty, the proposed model would require the review of the denunciation's legitimacy. Indeed, in my opinion, the Venezuelan denunciation was fully illegitimate. On August 5, 2008, the Inter-American Court ordered the Venezuelan government to reinstall Judges Ana Ruggeri, Perkins Rocha, and Juan Apitz to the bench.¹³⁰ On December 18, 2008, the Venezuelan Supreme Tribunal of Justice held that the Inter-American Court's decision was unenforceable and requested the National Executive to submit the AMCHR denunciation.¹³¹ This judicial decision shows an indisputable intrusion on the political executive power to justify the non-compliance of the Inter-American Court's decision.¹³² Before the AMCHR denunciation was submitted before Inter-American Commission on Human Rights, two other claims against violations on the free speech right were highly reported by the media.¹³³ Subsequently, the Inter-American Court decided the first case on January 28, 2009¹³⁴ and the second case under its residual temporary jurisdiction on June 22, 2015.¹³⁵ Both cases were in favor of the plaintiff, but the government completely disregarded the Inter-American court's decisions.¹³⁶ The Venezuelan Supreme Court of Justice nowadays totally ignores the Inter-American court judgments.¹³⁷

¹³⁰ *Apitz Barbera y otros* ("Corte Primera de lo Contencioso Administrativo") v. Venezuela, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1822, ¶ 267(17) (Aug. 5, 2008).

¹³¹ Republica Bolivariana de Venezuela Sala Constitucional Expediente No. 08-1572 [Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela File No. 08-1572] Dec.18, 2008, 1, 25 ("[S]e solicita al Ejecutivo Nacional proceda a denunciar este Tratado o Convención, ante la evidente usurpación de funciones en que ha incurrido la Corte Interamericana de los Derechos Humanos, con el fallo objeto de la presente decision . . .").

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *See Perozo y otros v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 195 (Jan. 28, 2009).

¹³⁵ *See Granier et. al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 293 (June 22, 2015).

¹³⁶ *See generally* Meier Garcia, *supra* note 129.

¹³⁷ *Id.*

The Inter-American court should reinstall the AMCHR for Venezuela, invalidate its denouncement, and assert the Venezuelan Supreme Tribunal of Justice's denouncement approval as incompatible with the constitutionally internationalized AMCHR.

To abrogate the AMCHR is to directly repeal not only the Venezuelan Constitutional textual mention of the AMCHR, but also the supra-constitutional rank of the international human rights treaty together with the right to seek relief before the Inter-American court. This type of contention against the AMCHR is unprecedented in the region, as it intends to erase the human rights contained within the AMCHR for the Venezuelan people.

V. CONCLUSION

Certainly, the principle *ubi jus ibi remedium* did not refer to any specific remedy, but a right to a remedy. The proposed "*jus cogens* complementary jurisdictional model" is a hybrid among monist and dualist international law perspectives. It intends to amplify the traditional and mechanical jurisdictional paradigm governing the international treaty law.

To dispute the prospective lack of protection, the proposed model incorporates two conjunctive components to encompass human rights remedies. These new elements are the internationalized constitutional safeguard of rights and the substantive reviewability of the treaty denunciation legitimacy as potentially bias state action to leave a treaty through a counter-*jus cogens* intention. The state-of-the-art international human rights law is propitious to advance. Important reflections in the scholarly and the international courts' jurisprudence indicate a possible success. Currently, Latin America has developed a profound interface between constitutions and international human rights law toward *Ius Constitutionale Commune*, a purpose to be progressively accomplished. In close relation to the people's concrete life, the undisputable normative interconnection is inter-related to human dignity. While international human rights law and constitutions tend to remain the same, interpretations of the norms should change in harmony with the constant, but imperceptible changes in the social reality of daily life.